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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1949.

No. _____

MARY KATHRYN CASTLE STEINWAY, *Petitioner,*

vs.

MAJESTIC AMUSEMENT COMPANY, AN OKLAHOMA CORPORATION; HOTEL LAST FRONTIER, INC., A NEVADA CORPORATION; GRIFFITH CONSOLIDATED THEATRES, INC.; GRIFFITH METROPOLITAN THEATRES, INC., DELAWARE CORPORATIONS, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the decision of the "United States Court of Appeals for the Tenth Circuit" affirming the judgment of the United States District Court for the Northern District of the State of Oklahoma, which she asserts is in direct conflict with the principles of law announced by this Court and other Circuit Courts of Appeal. The opinion of the United States Court of Appeals for the Tenth Circuit, not reported, appears in the record (R. 111 to 117), and the judgment of the United States District Court for the Northern District of Oklahoma sustaining a motion to quash summons and dismissing the action for want of venue appears in the record (R. 70).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Nature of Action.

The petitioner, a resident, citizen and domiciled in the State of New York, and since 1928 a minority stockholder of the Majestic Amusement Company (and Ritz Theatre, Inc., involved in a companion suit), Oklahoma corporations, domiciled at Tulsa, Oklahoma, instituted this action in United States District Court for the Northern District of Oklahoma in the nature of a derivative action against Griffith Consolidated Theatres, Inc., formerly Consolidated Theatres, Inc., and Griffith Metropolitan Theatres, Inc., Delaware corporations authorized to do business in the State of Oklahoma, alleging (R. 1-20) that the aforesaid corporations, while competitors of Majestic Amusement Company, had in 1946 wrongfully and contrary to the Constitution of the State of Oklahoma (R. 13), contrary to public policy, and in furtherance of a conspiracy to create a monopoly in restraint of trade in the operating of moving pictures in the City of Tulsa, in violation of Sections 1 and 2 of the Sherman Act, acquired a majority of the stock of Majestic Amusement Company and were, as competitors of the aforesaid "Majestic," controlling the affairs of said corporation, and when threatened with proceedings to test their right to hold and vote said stock, made a hurried transfer, based upon paper consideration (R. 22-23), to Hotel Last Frontier, Inc., a Nevada corporation not authorized to do business in Oklahoma and not having appointed an agent upon whom service could be had, which said Nevada corporation had knowledge of the illegal manner and purpose for which said stock had been acquired and used. The Nevada corporation and the Majestic Amusement Company,

whose officers are dominated and controlled by the defendants aforesaid, were both joined as parties defendant. Jurisdiction of the Federal Court is based upon diversity of citizenship, which is not controverted. (R. 1 to 18; amendment, R. 29 to 32.)

Facts Alleged in Complaint.

That petitioner has since 1928 been the owner of 3,750 shares of Majestic Amusement Company stock, with 52,000 shares outstanding, the names of the stockholders being listed (R. 3 and 4), which corporation owns and operates two theatres in the City of Tulsa. The Griffith Consolidated Theatres, Inc., formerly Consolidated Theatres, Inc., is a Delaware corporation engaged in operating eight or ten moving picture theatres in and adjacent to the City of Tulsa and in competition to the theatres owned by the "Majestic" (R. 2). That L. C. Griffith, H. J. Griffith, and R. E. Griffith, a brother now deceased, prior to 1938 entered into an illegal combination by combining the purchasing powers of separate corporations owned by them for the purpose of monopolizing the moving picture theatre business in certain cities in Texas, New Mexico and Oklahoma, in violation of the Anti-Trust Laws of the United States and contrary to public policy, all as set forth in the opinion of this Court in *United States of America* v. *L. C. Griffith, et al.*, rendered May 3, 1948, published 334 U. S. 100.

That in furtherance of said conspiracy, H. J. Griffith and L. C. Griffith in 1938, while president and secretary respectively of Consolidated Theatres, Inc., for the purpose of extending the aforesaid monopoly acquired certain theatres in Tulsa which were operated in competition with the theatres owned by the Majestic Amusement Company, and entered into a plan and scheme with one Ralph Talbot, presi-

dent, director, manager, and majority stockholder of the Majestic Amusement Company to extend the monopolistic powers of the Griffith "combination" to include the City of Tulsa (R. 6). That in furtherance of said plan and scheme, the following overt acts were committed in conjunction with said Ralph Talbot (R. 6):

(*a*) That said Talbot, in violation of his trust, organized "Delman Theatre, Inc.," an Oklahoma corporation, and to conceal his control and connection therewith had the stock issued to employees, but personally, and in secret, negotiated a lease on a new large theatre building, taking the lease in the name of Delman Theatre, Inc., for a term of ten years, and allowed the Griffith "combination" to operate said theatre in competition with Majestic Amusement Company during the term of said lease.

(*b*) That the Griffith "combination" for the purpose of concealing the aforesaid monopoly, used and employed various agents and employees to whom a share of stock would be issued in trust for the Griffith "combination" and elected said agents as officers and directors of one or more of its various corporations, one of said employees being R. I. Payne (R. 8).

(*c*) That in 1945, the Griffith "combination," in furtherance of its conspiracy aforesaid to increase its monopolistic power in the City of Tulsa, decided it necessary to acquire the 15,000 shares of stock owned by petitioner and her mother, and in furtherance of said scheme, said Talbot demanded that the petitioner and her mother sell and transfer all of their stock to him, and upon their refusal then threatened that he would so operate the Majestic Amusement Company that they would realize so little from their investment they would be forced to sell, and also threatened

if they did not sell, he would operate other motion picture theatres in the City of Tulsa in competition to the Majestic Amusement Company and, thus, ruin its business (R. 8, 9).

(*d*) The negotiations between said Talbot and the Griffith "combination" after the decision of the United States District Court for the Western District of Oklahoma, 68 Fed. Supp. 180, dismissing the Government's suit against said monopoly, and in the interim before reversal by this Court, 334 U. S. 100, became more open, in that in December, 1946, the said Talbot transferred a majority of the stock in the "Majestic" and "Ritz" corporations to the Griffith "combination" for a consideration in excess of $1,100,000.00, the first payment of $275,000.00 being paid by check of the defendant Griffith Metropolitan Theatres, Inc., and the balance by checks and notes of the Griffith Conolidated Theatres, Inc. (R. 23, 24) That four shares of said "Majestic" stock were taken in the names of employees of the Griffith "combination" and the balance in the name of Griffith Consolidated Theatres, Inc., a competitor of Majestic Amusement Company. That at the annual stockholders' meeting in January, 1947, the said four employees were elected as directors, the other two directors being agents of the said Talbot, and on the date of their election entered into an administrative contract with said Talbot whereby he was to receive, and has been receiving ever since, 5% of the gross income of the Majestic Amusement Company, which said gross income for the year 1946 was approximately $630,000.00. (R. 10, 11)

(*e*) That the management of said Majestic Amusement Company from 1947 to April, 1948, was operated by the aforesaid directors in such a manner to substantially decrease the income of Majestic Amusement Company's theatres, while the income of the Griffith theatres in Tulsa

substantially increased. That at the January, 1948, meeting of the stockholders of the Majestic Amusement Company, the agents of the Griffith Consolidated Theatres, Inc., advised they were working on a plan of merging the Majestic Amusement Company and Ritz Theatre, Inc., with the Griffith "combination." That in February, 1949, said plan of merger was presented to the minority stockholders who objected and served notice demanding a stockholders' meeting be called to remove the aforesaid directors and further advised the Griffith "combination" that if an attempt was made to merge said corporations, proceedings would be instituted to enjoin it from voting said stock (R. 11) for the reason that the acquisition of said stock by the Griffith Consolidated Theatres, Inc., a competitor of the Majestic Amusement Company, and its act of voting said stock, were both in violation of Section 41, Article 9, of the Constitution of the State of Oklahoma, and in violation of the Anti-Trust Law of the United States, and contrary to public policy. (R. 13)

(*f*) That shortly after the aforesaid notice, the Griffifth Consolidated Theatres, Inc., made a hurried transfer of said stock to the Hotel Last Frontier, Inc., a Nevada corporation of which the aforesaid H. J. Griffith was president, except one share was transferred to R. I. Payne, a director of Hotel Last Frontier, Inc., and one share to Fred Morley, a former employee of the Griffith "combination." That the transfer of the aforesaid stock was not a sale to a bona fide purchaser for value, but was made for the purpose of carrying out their aforesaid monopolistic scheme in order to continue said monopoly in restraint of trade in violation of the Anti-Trust Laws (R. 11, 12), and to thus enable the Griffith "combination" to continue to dominate and control, through the aforesaid agents and employees,

the inner affairs of its competitor, Majestic Amusement Company (R. 13, 14), to the injury and damage of this petitioner and her mother, minority stockholders. That for the purpose of continuing the control of the Majestic Amusement Company by the Griffith "combination," a meeting of the directors of the Majestic Amusement Company was called and the aforesaid Griffith agents resigned as directors and the said Payne and Morley, together with four employees of the said Talbot, were then elected as directors and the said Payne elected as president, and have so continued to serve since May 3, 1948, with the said Payne occupying the dual position of director of Hotel Last Frontier, Inc., and director and president of Majestic Amusement Company. That the new board of directors immediately ratified the aforesaid administrative contract with the said Talbot and have continued the same to this date, and through said operations, the income of the Majestic Amusement Company has continued to decrease while the income of the theatres operated by the Griffith "combination" in Tulsa has continued to substantially increase.

Motions and Judgment.

Service of summons was had upon the Griffith corporations, and upon Hotel Last Frontier, Inc., by serving the Secretary of State of Oklahoma, as authorized under Section 472, Title 18, Oklahoma Statutes 1941.

Hotel Last Frontier, Inc., filed a motion to quash service of summons on the ground that it was not authorized to do business in the State of Oklahoma, had not appointed a service agent and was not engaged in business therein, and moved to dismiss for want of venue (R. 39, 40). The Griffith corporations filed a motion to dismiss upon the ground that Hotel Last Frontier, Inc., was an indispensable party and that no service could be had upon it in Oklahoma (R. 38).

The United States District Court for the Northern District of Oklahoma, on April 6, 1949, entered judgment sustaining said motions and dismissed said complaint (R. 70) and timely appeal was then taken to the United States Court of Appeals for the Tenth Circuit.

Basis of the Court's Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. A. 1254, formerly Section 347, and under Paragraph 5 of Rule 38 of the rules of this Court. Under the principle enunciated by this Court in *Mangum Import Company, Inc.*, v. *Coty*, 262 U. S. 159, 43 S. Ct. 531, jurisdiction should be assumed in order to secure uniformity of decision between the several circuits as the decision of the United States Court of Appeals of the Tenth Circuit herein is in direct conflict with the spirit and principles of law announced by this Court in *International Shoe Company* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, and the decisions of the United States Court of Appeals in *Bomze* v. *Nardis Sportswear, Inc.*, (C. C. A. 2) 165 F. (2d) 33; *Bach* v. *Friden Calculating Machine Co., Inc.*, 167 F. (2d) 679; *Cloverleaf Freight Lines, Inc.*, v. *Pacific Coast Wholesalers Assn.*, (C. C. A. 7) 166 F. (2d) 626, and also because it involves a question of importance in the public interest in that to permit said decision to stand as a principle of law would permit a corporation to violate the statutes and Constitution of the State of Oklahoma in acquiring stock in its competitor corporation and when about to be called upon to answer for its wrongs to then transfer the *res* to a Nevada corporation controlled by the same group and to permit it to continue to perpetuate its monopoly and wrongdoing free from redress to the injured parties. This cause is further of importance and is impressed with public inter-

est in that the decision as it now stands permits the Griffith "combination" to perpetuate the very same monopolistic practices heretofore denounced by this Court in the case of *United States* v. *Griffith,* 334 U. S. 100, involving the same monopolistic group.

The decision of the United States District Court for the Northern District of Oklahoma was entered April 6, 1949; the final opinion of the United States Court of Appeals for the Tenth Circuit upon appeal timely presented was entered December 28, 1949, rehearing denied, February 9, 1950, and mandate issued to the District Court on February 10, 1950.

Question Presented.

Whether:

> "A non resident corporation that acquires a majority of the stock of an Oklahoma corporation, not as an innocent purchaser for value, but from a competitor corporation of the local corporation, with knowledge of the following facts, to-wit: That the aforesaid stock had been acquired and voted by a Griffith competitor corporation in violation of the Constitution of the State of Oklahoma, to perpetuate a fraud upon the minority stockholders of the local corporation, and to force them to sell their stock at a sacrifice, and in furtherance of an illegal plan and scheme of the Griffith 'combination' to create a monopoly in the moving picture theatre business in Tulsa, Oklahoma, in violation of Sections 1 and 2 of the Sherman Act, and which acquisition was by the non-resident corporation for the primary purpose of continuing said monopoly and scheme and to injure and damage the minority stockholders, and that to carry out the primary purpose aforesaid, one share of said stock was taken in the name of R. I. Payne, a director of the non-resident corporation and one share in the name of Fred Morley, a former associate of the Griffith 'combination,' to enable

them to qualify as directors of the local corporation, and then arranged for said Payne and Morley, in April, 1948, to be substituted as directors following the resignation of two agents of the Griffith 'combination' that had been acting as directors and to have said Payne elected President of the local corporation, and to then have said Payne, as President, call a stockholders' meeting on May 4, 1948, to ratify an administrative contract with said Talbot, and at said stockholders' meeting, the non-resident corporation, over the protest of the minority stockholders of the right of the non-resident corporation to vote its said stock, did vote the ratification of the said administrative contract, and again in January, 1949, by voting its said stock, elected the same officers and directors, and during all of said time its said officers and agents, with the aid of officers and other directors of its choosing, direct and control the policy and affairs of said local corporation to the injury of the minority stockholders,''

by such activities is sufficiently present in the State of Oklahoma to make it amenable to process in an action by the minority stockholders to test the right of said non-resident corporation to continue to vote said majority stock at the regular and special meetings of the Majestic Amusement Company to be held in Tulsa, Oklahoma, and thus dominate and control the policy and affairs of the local corporation

Reasons for Granting Writ.

(*1*) That the Court has erred in deciding a question of substantive law, by holding Hotel Last Frontier, Inc., was not subject to the jurisdiction and venue of the courts of Oklahoma nor amenable to process therein, which question of law, under the facts heretofore stated, is of general and public importance, as the denial of venue and jurisdiction upon the doctrine of separate entity of the corporation not

only works a fraud upon and injures, damages and wrongs petitioner, but sanctions and permits the conspirators aforesaid to continue to perpetuate an illegal combination in restraint of trade in violation of Sections 1 and 2 of the Sherman Act and in effect to nullify the decision of this Court in *United States* v. *Griffiths*, 334 U. S. 100.

(*2*) That the effect of the decision of the Court of Appeals for the Tenth Circuit is of further general importance in that if the Oklahoma courts are held to not have jurisdiction and venue under the facts stated, said decision would sanction and permit the conspirators by manipulation to create a situation where petitioner, a minority stockholder, must suffer injury and damage for want of a proper forum to grant redress, as petitioner cannot maintain an action for redress in Nevada, the home of the non-resident defendant, as the Majestic Amusement Company is an indispensable party to such an action and said conspirators control the officers and directors of said Majestic Amusement Company and that said officers and directors will not prosecute an action for the benefit of said local corporation nor consent that it be sued in any other forum than that of its residence.

(*3*) That the effect of the decision of the Court of Appeals is of importance to the public interest for the reason that it places the petitioner in the position that as a citizen of the United States, she must continue to suffer injury and damage to her property and property rights for want of a proper forum to grant redress against wrongs committed against her in Oklahoma by the acts of a non-resident corporation in the management and control of its majority stock in the local corporation in which petitioner is a minority stockholder, and such result should not be sanctioned or become final until this Court has unmistakably placed its approval thereon.

Wherefore, petitioner respectfully submits:

That a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit that its decision may be corrected.

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Attorney for Petitioner.

BRIEF IN SUPPORT OF WRIT FOR *CERTIORARI.*

Certiorari is sought to review an opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, which is set forth in the record (R. 112 to 117), and wherein that court affirmed a decree of the United States District Court for the Northern District of Oklahoma, which appears in the record (R. 70).

The case is of general importance for the decree complained of has decided the question of venue as to a non-resident corporation directly contrary to and in conflict with the spirit and letter of the law announced by this court and other Circuit Courts of Appeal. The opinion, in effect, nullifies the opinion of this Court in 334 U. S. 100, which held that the Griffith "combination," involved herein, was engaged in an illegal combination in violation of Sections 1 and 2 of the Sherman Act in that it permits the conspirators to escape liability for wrongs, injuries and damages done to the minority stockholders of the local corporations by transferring the majority of stock to a non-resident corporation.

Moreover, instead of breaking up monopolies, it opens the gate whereby individuals and corporations who combine together to perpetrate a fraud upon the minority stockholders of local corporations by acquisition of the majority stock of said local corporations and then use and employ said majority stock in the local corporations to create and establish a monopoly in the moving picture theatre business, may escape liability by transferring the stock tc a friendly non-resident corporation, of which one of the conspirators is president, and said non-resident corporation, through its

ownership of the majority of the stock, continues the policy of managing the local corporation in a manner to effectuate the purpose intended by the original conspirators, all to the injury and damage of the minority stockholders.

If such non-resident corporation can continue to effectuate the management of the property through its ownership of the stock and be not amenable to a process to determine its right to vote in the forum where the property is situated on the theory it is not doing business therein, then it escapes liability as there is no other forum in which said right can be determined and adjudicated.

Specifications of Error.

The Court of Appeals for the Tenth Circuit erred:

(*1*) In that the holding, under the facts above set forth in the petition, *supra*, that Hotel Last Frontier, Inc., was not sufficiently present in the State of Oklahoma to be amenable to process to test its right to vote said stock at annual and special meetings of stockholders to be held in Tulsa, Oklahoma, is in conflict with the principles of law announced by this Court in *International Shoe Company* v. *Washington*, 326 U. S. 310, 66 S. Ct. 150, and the principles announced by the Second Circuit in *Bomze* v. *Nardis Sportswear, Inc.*, 165 F. (2d) 33, and by the Sixth Circuit in *Bach* v. *Friden Calculating Machine Co., Inc.*, 167 F. (2d) 679, and by the Seventh Circuit in *Clover Leaf Freight Lines, Inc.*, v. *Pacific Coast Wholesalers Ass'n*, 166 F. (2d) 626.

(*2*) In applying the doctrine of corporate entity in a proceeding where it is apparent that wrongdoers are undertaking to "play hide and seek" with an injured party, and in not dealing with the substance of the transaction, and in that respect is in conflict with the decisions of the Su-

preme Court of the United States in *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Assn.*, 247 U. S. 490, 38 S. Ct. 553; *Maloney Tank Mfg. Co.* v. *Mid-Continent Petroleum Corporation*, (C. C. A. 10) 49 F. (2d) 146, 150; *Great Northern Co-Op. Association* v. *Bowles*, (United States Emergency Court of Appeals) 146 F. (2d) 269.

Argument and Authorities.

An analysis of the opinion of the Court of Appeals (R. 112 to 117), conclusively establishes said opinion is in direct conflict with the spirit and letter of the principles of law of this Court and of at least three other Circuit Courts regarding the facts applicable and controlling in determining venue of a non-resident corporation and if amenable to process in the state. The question of what facts are material is of general importance. The opinion in the instant case is so contrary to the spirit and letter of law announced by this Court and at least three other Circuit Courts, that certiorari should issue to secure uniformity of decisions between the courts of the various circuits and the decision of this Court under the holding in *Mangum Import Company* v. *Coty*, 262 U. S. 159, 43 S. Ct. 531.

The Court of Appeals has decided two substantive questions of law regarding (*a*) venue of non-resident corporations; and (*b*) that separate corporate entity is disregarded where not to do so will defeat public convenience, work a fraud, or justify a wrong, in both instances contrary to the spirit and letter of the law as announced by this Court and other circuits.

I.

The facts material and relevant in determining whether a non-resident corporation is amenable to process in the courts of the state are thoroughly enunciated by this Court

in *International Shoe Company* v. *State of Washington*, 326 U. S. 310, 66 S. Ct. 150. The Court in said case refers to the various holdings in numerous decisions, and stated what facts are important, material, and relevant in determining whether a non-resident corporation's activities within a state are sufficient to be amenable to process in said state.

This Court in the aforesaid opinion, in determining whether a non-resident corporation's acts were amenable to process within a state, enumerated certain acts as a test and in so far as material to the factual situation involved herein, may be summarized as follows:

(*a*) Where a nonresident corporation's activities consist of exercising privileges conferred upon its citizens and expects to enjoy the benefits of the law for its protection, and in the exercise of said privileges it incurs obligations or liabilities arising out of, or connected with, its activities in the state, in such a case it should be held to be amenable to the process of the state of the forum, at least to defend an action brought to enforce said liabilities;

(*b*) The test is not whether the activities of the non-resident corporation is a little more or a little less, but whether the activities are sufficient that the maintenance of the suit arising out of said activities within the forum offend "traditional notions of fair play and susbtantial justice";

(*c*) It is also proper to consider the question of "the estimate of the inconvenience"; that is, as to whether it would be more convenient that the case be tried in the forum where it arose, where the witnesses are present, or trial had in the state of domicile of the corporation, which might be far removed from the place where the controversy arose and where the witnesses were available.

The Federal District Courts and the Courts of Appeal for the Second, Sixth and Seventh Circuits have construed

the force and effect of said opinion contrary to the construction placed upon the same by the Court of Appeals in the opinion involved herein.

In *Marlow* v. *Hinman Milking Machine Company,* (D. C.) 7 F. R. D. 751, in construing the above opinion of this Court, construed *International Shoe Company* case as holding that if a foreign corporation has certain minimum contacts within the state, that the maintenance of a suit or a cause of action in a proceeding growing out of said activities does not "offend traditional notions of fair play and substantial justice," the non-resident corporation is amenable to process within the state.

The Court of Appeals for the Sixth Circuit, in *Clover Leaf Freight Lines, Inc.,* v. *Pacific Coast Wholesalers Ass'n,* 166 F. (2d) 626, in a case where one of the facts was very similar and analogous to the facts in the case at bar, as the defendant therein was a California corporation, its vice-president was general manager of a transportation company in Chicago, and it had certain contacts with the transportation company and was sued in the State of Illinois, and, as in the case at bar, a motion to dismiss was filed on the theory it was not engaged in business in the State of Illinois and said defendant corporation and the transportation company were separate entities and there was no relationship between the two. The Circuit Court in disposing of said question in its opinion used the following appropriate language, to-wit:

> "Our guide is the opinion of the late Chief Justice STONE, rendered in the case of *International Shoe Co.* v. *Washington* (*supra*). In the light of the opinion in that case, we have little doubt that the defendant was 'doing business' in the State of Illinois in this case so as to be subject to suit here."

The Court in its opinion further stated:

> "While there seems to have been no corporate relationship between the two (referring to the California corporation and the Illinois corporation), the *vice-president of Transport Co.* (the Illinois corporation) *was general manager of the defendant* (referring to the California corporation), *a fact not to be ignored for, it suggests possibility of control which defendant might have had in determining Transport's policy and operation.*"

The above facts are very similar to the case at bar, as Hotel Last Frontier, Inc., in acquiring the majority of the stock of the local corporation took one share of stock in the name of one of its directors, to-wit, R. I. Payne, and one in the name of Fred Morley, both of whom hold the stock as agents of said corporation, Hotel Last Frontier, Inc., voted the majority stock and caused its agent, Fred Morley, and its other agent, R. I. Payne, also a director of the non-resident corporation, to be elected directors of the local corporation, and they actively, for a period of ten months prior to filing this suit, have been acting as directors and directing the affairs and policy of the local corporation. In addition thereto, R. I. Payne, its agent, is president of the local corporation and has been for approximately ten months.

The Court of Appeals for the Seventh Circuit held the above fact was material and the corporation amenable to process, while in the case at bar the Court holds, by not referring to said fact upon the theory it is immaterial, there is no venue. This creates a conflict as the courts for the Seventh Circuit hold the corporation, under said facts, is amenable to process and can be sued in such an action, while in the Tenth Circuit said corporation is not amenable to process.

The opinion of the Court of Appeals is further in conflict with the opinion of the Court of Appeals for the Second Circuit in *Bomze* v. *Nardis Sportswear, Inc.,* 165 F. (2d) 33, reversing an order quashing summons. The Court, in referring to the case of *International Shoe Company* v. *Washington, supra,* stated:

> "The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests: the convenience of the obligee against the burden upon the corporation."

The Court further stated:

> "If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities; for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere."

The opinion of the Court of Appeals is also in conflict with the Court of Appeals for the Sixth Circuit, as announced in *Bach* v. *Friden Calculating Mach. Co., Inc.,* 167 F. (2d) 679. In said case, the court sustained the motion to quash service and dismiss the action, which was reversed by the Court of Appeals for said circuit. In said opinion the court stated as follows:

> "Two recent opinions reversing District Court orders which quashed service of progress on foreign corporations are illuminative: that of Judge Evan Evans in *Clover Leaf Freight Lines, Inc.,* v. *Pacific Coast Wholesalers Association,* 7 Cir., 166 F. (2d) 626, and that of Judge Learned Hand in *Hyman Bomze, et al.,* v. *Nardis Sportswear, Inc.,* 2 Cir., 165 F. (2d) 33."

The court further stated:

> "It was not to be doubted that the opinion of the Supreme Court in the *International Shoe Company*

> case manifested a broadened viewpoint toward the right of citizens to sue a non-resident corporation • • • whose activities formerly frequently were considered not to constitute 'doing business' by the corporation or to render it 'present' for jurisdictional purposes within the state of the forum."

The facts in the instant case are set forth in the statement of the petition for certiorari, *supra* (pp. 2 to 7), and present a factual situation, if the above cases are followed and adhered to, that the trial court erred in holding the Hotel Last Frontier, Inc., was not amenable to process in the present action.

The opinion of the Court of Appeals herein, in referring to *International Shoe Company* v. *Washington, supra,* takes a different view as to the force and effect of the same, and in referring thereto states:

> "The only question before the United States Supreme Court was whether the Washington court had exceeded the powers of due process in sustaining the service. The court was of the opinion, that when the quality and nature of the Shoe Company's activities in the state were considered in relation to the 'orderly and fair administration of laws,' the asserted jurisdiction did not infringe due process." (R. 115)

The Court in its opinion, concedes that:

> "Any such assertion of 'physical power' would not 'offend traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer,* 311 U. S. 457, 459. Yet, we know that the Oklahoma courts have not gone so far, and we cannot now forecast that they will." (R. 116)

It is significant that the Oklahoma courts have not decided a case involving a similar state of facts, nor construed the holding of *International Shoe Company* v. *Washington supra.*

It is apparent that the Second, Sixth and Seventh Circuit Courts of Appeals construe *International Shoe Co.* v. *Washington, supra,* as announcing a general principle that certain facts are material and relevant in determining whether a non-resident corporation, that has certain contacts within the state, is subject to venue in the forum of the state and amenable to process, while the Tenth Circuit presents a contrary construction upon said decision upon the apparent theory that principles announced therein are purely dicta and not binding and controlling upon it except that the principles in that case "do not infringe due process." This is made more apparent as the Tenth Circuit does not in its opinion refer to uncontroverted facts that are not only material but conclusive under the holding of *International Shoe Co.* case as construed by the Second, Sixth and Seventh Circuits.

It thus creates a conflict in the authorities as to the force and effect of this Court's opinion in *International Shoe Co.* v. *Washington* upon an important question and this Court should review and determine this case and determine the force and effect of its own opinion.

II.

The opinion under consideration, in so far as the same is based upon the theory of separate entity of corporations between the Hotel Last Frontier, Inc., and co-defendant, Griffith Consolidated Theatres, Inc., and Majestic Amusement Company, is in conflict not only with the former decision of said Court in *Maloney Tank Mfg. Co.* v. *Mid-Continent Petroleum Corporation,* (C. C. A. 10) 49 F. (2d) 146, 150, but in conflict with the decisions of this Court and other Circuit Courts announcing the general rule that separate corporate entity will be disregarded where not to do

so will defeat public convenience, work a fraud, or justify a wrong. The opinion is in conflict with the cases of *Great Northern Co-Op. Ass'n* v. *Bowles,* (United States Emergency Court of Appeals) 146 Fed. 269; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Ass'n,* 247 U. S. 490, 38 S. Ct. 553, and dissenting opinion, *Taylor* v. *Standard Gas & Electric Co.,* 96 F. (2d) 693, 707 *Id.,* 306 U. S. 307, 59 S. Ct. 543.

In *Great Northern Co-Op. Ass'n* v. *Bowles, supra,* in determining liability of the various corporations, the rule is stated as follows:

> "The courts should deal with realities and look through the form to substance and examine the entire transaction and pierce the corporate veil to determine where the moving force actually lies."

And as stated by this Court in *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Ass'n, supra,* in said case it was contended the ownership of stock in the local corporation did not constitute the local corporation as its agent. The Court, however, referred to the fact that the ownership of the stock was not an ordinary transaction but was used for the purpose of dominating and controlling the local corporation, and after stating said facts stated the rule to be as follows:

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but regardless of fiction, will deal with the substance of the transaction involved as if the corporate entity did not exist and as the justice of the case may require."

If the facts set forth in the statement of the petition for certiorari, *supra,* are considered, and the veil of this transaction is pierced, it reveals that the acquisition of the

stock by Hotel Last Frontier, Inc., was not an ordinary transaction, but to aid and assist the two Griffiths, who had extended their monopoly to the moving picture theatre business in the City of Tulsa, and by conspiring with Talbot, the president of the Majestic Amusement Company, to perpetuate the aforesaid monopoly in the City of Tulsa, and that when threatened by the minority stockholders to test its right to own and vote said stock, a hurried transfer was made by a corporation of which one of the Griffiths was a party, to Hotel Last Frontier, Inc., of which the other Griffith, H. J., was president. The failure to disregard corporate entity in such a transaction is to permit the original conspirators to continue a fraud upon the minority stockholders and aid and assist them in perpetuating a monopoly to violate the Sherman Act.

It is clear the Court of Appeals for the Tenth Circuit, upon the above important question of law, is adhering to the principles announced by the majority opinion in *Taylor v. Standard Gas and Electric Company*, 96 F. (2d) 693, and reversed by this Court, 306 U. S. 307, 59 S. Ct. 543, by applying the principle of law upon the above question set forth in the dissenting opinion, 707, and is thus in conflict not only with the decisions of this Court but the courts of other circuits.

The Writ of *Certiorari* Should Issue.

From the records in this case, it is clear that the Court of Appeals for the Tenth Circuit has decided an important question of substantive law involving the important question of venue over non-resident corporations and their being amenable to process in the state where its property is situated and the use of the property is being employed in a manner not only to wrong and damage the petitioner here-

in but to perpetuate a monopoly in the theatre business in the City of Tulsa in violation of the Sherman Act. The opinion of the Court of Appeals for the Tenth Circuit on the question of venue is in direct conflict with the opinions of this Court and the opinions of other circuits in construing the force and effect of the opinion of this Court in *International Shoe Company* v. *Washington*. The result is that in causes of action arising in the Second, Sixth and Seventh Circuits under similar facts, the petitioner could obtain redress, but in the Tenth Circuit, under the holding of that court, the petitioner is denied the right to proceed in the courts where the wrong is committed and she must suffer damage and injury for the want of a proper forum. She cannot proceed in the courts of Nevada, as the Majestic Amusement Company is an indispensable party in the proceeding and the non-resident corporation dominates and controls the directors and officers of said Majestic Amusement Company, although wrongfully and unlawfully, and they will not give consent that the action be prosecuted in the State of Nevada. The result is she is denied relief for the want of any forum to grant relief.

Respectfully submitted,

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